Responsibility for the acts of others

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Liability exposure in a health care liability claim is rarely a cut-and-dried matter. Office-based physicians are frequently taken aback when confronted with the fact that they, their medical group, or their professional association may be responsible for the conduct of another in their office or practice. Frequently, this confusion arises from the failure to appreciate and understand the concept of indirect or vicarious liability embodied in the legal theory of *respondeat superior*. The potential legal responsibility for the acts of others does not stop there though. This article discusses the basic theories and circumstances under which a health care entity or professional may be responsible for the acts of those employed by that entity or individual.

Respondeat superior embodies the general rule that an employer is responsible for the negligent acts or omissions of its employees. Under *respondeat superior* an employer is liable for the negligent act or omission of any employee acting within the course and scope of his employment (1). This is a purely dependent or vicarious theory of liability, meaning a finding of liability is not based on any improper action by the employer. The fact that the employer may have acted reasonably in hiring, training, supervising, and retaining the employee is irrelevant and does not provide a basis on which the employer can avoid liability for the acts of employees (1). The underlying premise of *respondeat superior* is that the cost of torts committed in the conduct of a business enterprise should be borne by that enterprise as a cost of doing business (2).

Whether or not an employer-employee relationship exists depends primarily on whether the employer has the "right of control" over the employee (1). The right of control at issue is the right to control the details and manner of the work performed by the employee (1, 3). In evaluation of the control issue, the inquiry focuses on whether the employer has the right to control the employee in performing the task at issue (3, 4). For example, in health care claims, the focus is on whether the employer has the ability to control the employee's provision of evaluation, diagnosis, or treatment services to patients (3).

If no right of control exists, the relationship is an employer-independent contractor relationship and not an employer-employee relationship. *Respondeat superior* does not apply when the one employed is an independent contractor. In contrast to employees who basically have standing employment and are subject to day-to-day control by their employer, independent contractors generally have independent businesses, are hired solely to perform specific and discrete tasks, and are paid "by the job" (5). Further, independent contractors generally have "sole control over the means and methods of the work to be accomplished" (1). While the fact that physicians exercise independent medical judgment in the treatment of their patients is a factor showing the absence of control, this "sole control" is only one factor and is not determinative of whether an employed physician is an employee or independent contractor (6). For example, medical residents and medical school faculty are generally considered employees, not independent contractors, even though they exercise independent medical judgment in treating their patients (6).

If an employment contract expressly provides that the hired party is an independent contractor, that is generally determinative as to whether or not the person hired is an employee or an independent contractor (7). The terms of a contract, however, do not always control. An exception exists if the facts under which the employer and "independent contractor" operated show that the contract's characterization of the relationship was a mere sham so that the employer could avoid liability exposure under *respondeat superior* (8). In the absence of a specific contractual provision establishing the hired party as an independent contractor, the party claiming it is not vicariously liable for the actions of another must plead and prove that this hired party is an independent contractor, not an employee.

Even when the employer hires an independent contractor, there are circumstances under which an employer can be responsible for the tortuous conduct of an independent contractor. Generally referred to as ostensible agency, this theory is also referred to as agency by estoppel, apparent agency, and apparent authority (9). The basis of imposing liability on the employer of an independent contractor under this theory of liability is because the employer has done something to hold out the independent contractor as its employee such that there is

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the reasonable belief that the independent contractor is actually the employee of the employer (10).

The classic ostensible agency issue arises in the context of hospital emergency room physician relationships. In emergency room cases, claimants routinely claim that the hospital is liable for the actions of the emergency room physician under ostensible agency. As a general rule, hospital staff physicians are seen as independent contractors, not hospital employees. Further, the agreements under which hospital emergency room physician relationships exist specifically provide that the emergency room physicians are independent contractors. Thus, these cases generally turn on whether or not the hospital did anything affirmative to "lure" patients to its emergency room (10). In particular, the primary issue is why the patient went to that specific emergency room. Unless the patient was lured to the facility by some affirmative act wherein the hospital held its staff physicians out as its employees, an ostensible agency claim should fail (11).

There are also circumstances under which an employee of one individual or entity can become the "borrowed employee" of another on a specific occasion. As with the employer-employee situation, the touchstone issue is control. For the employee of one employer to become the borrowed employee of another, that other must have exercised control over the employee during the specific incident at issue (1, 12).

An employer can also be directly liable for the negligence of its employees. This means that some negligent act or omission *of the employer* was a cause of, allowed, or led to the negligence of the employee, thereby causing injury to the claimant. This direct or independent liability of the employer generally arises from a claim that it negligently hired, trained, supervised, or retained the employee in question (13). These claims can also involve allegations that proper policies and procedures were not implemented or enforced and that those failures caused the injury at issue (13).

Based on this legal framework, in a typical office practice, office staff and member physicians will be employees. These individuals will be considered employees and not independent contractors because they are generally standing employees present during and to assist in the day-to-day operation of the practice. They do not maintain their own independent business and are not hired for a discrete, limited purpose. Further, the physician or practice that has retained them has control over the details of their work in terms of when they will be present to see and treat patients, how they will conduct themselves, and the specifics of how they will see and treat office patients. Thus, the physician or entity that employs these individuals will be liable under *respondeat superior* for any negligent act or omission of these individuals performed within the scope of their duties.

In contrast, a *locum tenens* physician will be an independent contractor (14). This is an independent individual who is hired solely to provide physician services as a substitute physician for a limited period of time. While office hours may exist, such physicians exercise their own professional judgment in treating patients and are not subject to the same routine management as standing employees.

When utilizing a *locum tenens* physician, however, one needs to be aware of liability exposure under ostensible agency (15). It would probably not be difficult for patients to credibly argue that they thought the *locum tenens* was an employee of the practice, particularly if they were an established patient of the absent physician. Thus, it is very important that a *locum tenens* physician be specifically identified as a nonemployee independent contractor when seeing patients. Otherwise, the entity or individual who hired the *locum tenens* may very well be liable for any improper acts or omissions by that physician.

There are three final take-home messages. First and foremost, make sure you or your practice has professional liability coverage not only for the physician personnel, but for any nursing and other nonphysician personnel in the office. This is important because health care liability claims can and do arise from the actions of nonphysician and even nonprofessional personnel. For example, I have seen very significant claims based on staff failure to communicate patient complaints to the physician, communicate patient update information to the physician from hospital personnel, call in the correct prescription information (including medication, dose, and frequency), and properly advise the physician personnel of laboratory, pathology, and radiographic study results because those documents were lost, misfiled, or filed in the wrong patient chart.

Second, make sure that any employees are supervised and that problem employees are not retained. If a member of your group acts negligently, you must expect there will be a direct liability claim for negligent hiring, training, supervision, or retention of that person. In my experience it is rare that the employee at issue in one of these claims is a longstanding, well-qualified, well-experienced, still-employed exemplary employee that simply made a mistake. More often than not, the employee involved was not very good to begin with, had been talked to before about competency-related issues, and was subsequently let go for similar reasons within 12 months or so of the incident at issue.

The assertion of a claim against an employee also means that employee's past experience and performance are relevant. As such, the hiring, training, supervision, and retention of that employee are relevant and discoverable. For this reason, it is imperative that problematic employees not be retained. It is also important that any concerns about employees are quickly and properly addressed and that these steps are noted in that employee's file.

Third, if *locum tenens* physicians are ever used, make sure that patients are directly informed that the doctor present is a substitute and not an employee of the physician or practice. This should be handled by the front office staff when the patient signs in and should be noted and documented by the physician when he or she actually sees the patient.

Nothing can absolutely prevent a lawsuit. Taking these simple steps, though, can at least reduce the anxiety associated with claims involving employees and independent contractors and put you in a good position to defend those claims.

1. *St Joseph Hosp v Wolff,* 94 SW3d 513, 541–42 (Tex 2002); *Baptist Mem'l Hosp Sys v Sampson,* 969 SW2d 945, 947 (Tex 1998).

2. *Wolff,* 94 SW3d at 540.
3. *Farlow v Harris Methodist Fort Worth Hospital,* 284 SW3d 903, 911 (Tex App—Fort Worth 2008, pet denied).
4. See *Read v Scott Fetzer Co,* 990 SW2d 732, 736 (Tex 1998); *Exxon Corp v Tidwell,* 867 SW2d 19, 23 (Tex 1993); *Omega Contracting Inc v Torres,* 191 SW3d 828, 847 (Tex App—Fort Worth 2006, no pet).
5. See *Limestone Products Distributor Inc v McNamara,* 71 SW3d 308, 312 (Tex 2002).
6. See *Murk v Scheele,* 120 SW3d 865, 866 (Tex 2003); *Miers v Texas A&M University System Health Science Center,* 2009 Tex App LEXIS 9818 *10–11 (Tex App—Waco) (Dec. 30, 2009) (mem op).
7. See *Coastal Plains Development Corp v Micrea,* 572 SW2d 285, 287 (Tex 1978); *Producers Chemical Co v McKay,* 366 SW2d 220, 226 (Tex 1963); *North American Van Lines Inc v Emmons,* 50 SW3d 103, 117 (Tex App—Beaumont 2001, pet denied).
8. See *Newspapers Inc v Love,* 380 SW2d 582, 588–90 (Tex 1964).
9. *Sampson,* 969 SW2d at 948 n2.
10. See *Sampson,* 969 SW2d at 948.
11. See *Denton v Big Spring Hosp Corp,* 998 SW2d 294, 297 (Tex App—Eastland 1999, no pet). See also *Farlow,* 284 SW3d at 925–26.
12. See *Sparger v Worley Hosp,* 547 SW2d 582, 583 (Tex 1977).
13. See, e.g., *Center for Neurological Disorders PA v George,* 261 SW3d 285, 294 (Tex App—Fort Worth 2008, pet denied); *University of Texas Medical Branch v Railsback,* 259 SW3d 860, 862 (Tex App—Houston [1st Dist] 2008, no pet).
14. See, e.g., *Hinkle v Adams,* 74 SW3d 189, 196 (Tex App—Texarkana 2002, no pet).
15. See *Sharsmith v Hill,* 764 P2d 667, 672 (Wyo 1998).